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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 914

OGDEN DAIRY COMPANY, a corporation,
Petitioner and Appellant below,

vs.

CLAUDE R. WICKARD, Secretary of Agriculture, United States of America, and MARVIN JONES, War Food Administrator,
Respondents and Appellees below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND SUPPORTING BRIEF.

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Respondents and Appellees below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND SUPPORTING BRIEF.

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Ogden Dairy Company, respectfully shows:

That it is aggrieved by the decree of the United States Circuit Court of Appeals for the Seventh Circuit, entered October 21, 1946 (R. 450), affirming the decree of the District Court of the United States for the Northern District of Illinois, Eastern Division, sustaining the order and rul-

ings of the respondents (R. 425), directing petitioner to pay to the Chicago Area Milk Market Administrator's producers' settlement fund $11,463.76 (R. 284). Upon a review of the order on December 3, 1943, the War Food Administrator concluded that the said sum of $11,463.76 is subject to whatever modification may be necessary as a result of recomputation for the month of September, 1940, to include the results of tests made at petitioner's plant by David F. Russell in that month (R. 362).

A.

Summary and Short Statement of the Matter Involved.

This controversey arises as a result of the amendment of administrative Order 41, effective July 1, 1940 (R. 469), issued pursuant to the Agricultural Marketing Agreement Act of 1937, 7 U.S.C.A. 608c (5). Sec. 941.4 (d) of the amended order (R. 460-461) requires, for the first time, that handlers account for butter fat in milk processed as fluid milk (Class I milk) (R. 303); and provides that handlers convert to quarts the quantity of milk so processed, multiply by 2.15 (quart weights 2.15 lbs) and "to multiply the result by the average butter fat test of such milk" (R. 461) "in the manner and on forms prescribed by the market administrator" (R. 460). The market administrator prescribed no manner or form for determining the average butter fat test as required by this section (R. 361).

On and prior to the effective date of said amended order and during the period in question—July, 1940 to March, 1942, inclusive—petitioner had four storage tanks of 5,000, 4,000, 3,000 and 1,700 gals. capacity, each respectively (R. 90), where raw milk, containing different butter fat content, from four sources was received from tank trucks daily (R. 52-53), and was not standardized, because of

lack of plant facilities, that is to blend the raw milk to a fixed butter fat content before processing (R. 137), a practice of many handlers in the area (R. 181); and petitioner's products, therefore, varied in butter fat content during each day (R. 131).

Petitioner's technician, during each day, took samples at intervals and butter fat tests thereof from the flow of milk from said tanks in turn, after it left the pasteurizer at the filler line, and weighted the butter fat tests to the volume of milk to which each sample appertained (R. 131) and from the results of said samples and tests struck the daily butter fat utilization in its products against the volume of milk processed (R. 159) and reported the utilization of the milk and butter fat in its products from the daily averages so obtained, in the detail and on forms furnished by the market administrator during each month of the period in question and paid for said milk on the basis of said reports.

It is stipulated by the respondents, after an examination of petitioner's books and records, that said monthly reports are correct as to the volume of milk received and the butter fat tests thereof as reported and the volume of sales, as to the quantity and the volume shown, are correct, only the butter fat content of petitioner's products are in dispute (R. 34).

Pursuant to Order 41, Sec. 941.3 (b) (R. 459) to verify petitioner's monthly reports, commencing July, 1940, the market administrator instructed his men to get bottles of milk from petitioner's icebox, some of which were so procured and others were purchased from petitioner's vendors until May, 1941 (R. 184-187) when petitioner received a bill in the sum of $9,814.39 and learned for the first time that said samples were used as a basis of audit and assess-

ment against the petitioner, due to differences in its reports of utilization and the market administrator's tests taken from said samples (R. 63). Prior to June 1, 1941, it was not the policy of the market administrator to mail out records of these tests to handlers (R. 169).

Petitioner protested that said samples were not representative and the market administrator agreed to take more numerous samples (R. 171). For a few days effective June 23, 1941, and for nearly every day during the month of July, they took samples and made tests at petitioner's plant and after that they returned to the plan of taking samples two or three times per week until August, 1941, when petitioner again protested that the samples were not representative. Thereupon the market administrator obtained more samples for the balance of the month and the respective averages of the petitioner and the administrator for August, 1941 tallied within 2/1000ths per cent. As a result the market administrator changed his procedure. Starting the first of September, 1941 until the close of the period March 31, 1942, samples were taken from the production line and tested at the plant (R. 171-172), however, not daily until April, 1942 when there was no difference in the respective tests (R. 49-50).

Based on the tests made by the market administrator for the period July, 1940 to March, 1942, inclusive, the amount originally billed $9,814.39, was adjusted on April 17, 1943 in the sum of $1,649.37 leaving a total of $11,983.76 (R. 217) which sum the market administrator found due for unaccounted butter fat in petitioner's products.

Pursuant to petitioner's petition filed September 8, 1942 (R. 14), an administrative hearing was had (R. 22-232) and on August 11, 1943, the presiding officer filed his report denying the relief prayed (R. 272-285). Petitioner filed exceptions to said report (R. 287-293) and the matter was

heard on oral argument before the War Food Administrator (R. 297-351). The administrator found that: "for each month of the period July, 1940-April, 1941, it was learned that the monthly average butter fat content for milk and milk products of each kind, was based upon a daily figure of butter fat tests carried in petitioner's records. The results of each test from which the recorded figure was obtained were not available for examination * * *" (R. 359); that "random sampling should give as true a monthly average as daily plant sampling" (R. 362); and on November 30, 1943 the relief requested by the petition was denied (R. 363).

Petitioner filed its complaint in the District Court on December 15, 1943 (R. 2-10), seeking to enjoin the enforcement of the order; the matter was submitted on the record and briefs. The Court on September 19, 1945 entered a decree finding respondents' rulings according to law (R. 425) and dismissed the complaint (R. 426). (The Court made no specific findings of fact or conclusions of law, as required by Rule 52A, Federal Rules of Civic Proceedure.)

An appeal from said decree was taken by petitioner to the Circuit Court of Appeals, which affirmed the decree of the District Court (R. 449). The principal questions involved on said appeal were; was there substantial evidence in the record to support the finding that, "'random sampling' should give as true a monthly average as daily plant sampling" (R. 362). Are the respondents empowered like the Collector of Internal Revenue of the United States or the Personal Property Tax Collector of the State of Illinois to levy an assessment based on an estimate (R. 411-412), because petitioner failed to preserve the results of the individual butter fat tests from which it determined its daily average utilization of milk and butter

fat in its products during the period July, 1940 to April, 1941, inclusive (R. 359). Did the method employed by the market administrator, taking random samples of petitioner's products and using the result of the tests thereof for the purpose of audit and assessment against the plaintiff, ascertain the correct figures and was it adapted to petitioner's system of production, as distinguished from other handlers in the area who standardized their raw milk before processing or did the method employed discriminate against petitioner and require petitioner to pay more for milk than other handlers (R. 7) in violation of the Act (R. 9); the market administrator not having prescribed any manner or form for determining the "average butter fat test" as required by amended Order 41, Sec. 941.4 (d), did that section require the doing of an act in terms so vague as to violate the requirements of due process of law (R. 9); which questions were decided by the Circuit Court of Appeals and materially affected the determination of the appeal.

B.

Statement of Basis Upon Which It Is Contended That This Court Has Jurisdiction to Reverse the Judgment of the United States Circuit Court of Appeals for the Seventh Circuit.

The Circuit Court of Appeals misconceived its power to review the order of the Secretary of Agriculture in this case, by finding that "Our examination of the question is limited to a determination of whether there was substantial evidence to support the order of the administrative tribunal" citing cases (R. 448). This is reversable error.

Whether or not the court is limited to the determination of whether there is substantial evidence to support the order, depends upon whether there is substantial evidence

in the record to support the administrative finding: "that random sampling should give as true a monthly average as daily plant sampling" (R. 362). This question the Circuit Court answered in the negative, by finding: "It would seem that the method employed by plaintiff was in some respects superior to that originally employed by the administrator indeed, the administrator must have thought so as he later, during the period in question, adopted much the same method" (R. 448).

This finding of the Circuit Court obviously decides that there was no substantial evidence in the record to support the administrative finding; and the question of mixed law and fact, that the method of sampling employed by the administrator was not adapted to petitioner's system of production, as distinguished from other handlers in the area, who standardized their raw milk before processing, and, therefore, the Court erred in not finding that the system of sampling employed discriminates against the petitioner and requires petitioner to pay more for milk than other handlers, in violation of the Act, and deprives petitioner of property without due process of law. The "substantial evidence rule" has no application to mixed questions of law and fact. *United States* v. *Idaho,* 298 U.S. 105; *Crowell* v. *Benson,* 285 U.S. 22.

This is the "yard stick" by which petitioner's liability was determined by the respondents, during the period of the most heavy assessment against the petitioner and the Court erred in not finding that the order was arbitrary, capricious and a denial of due process of law. *Federal Radio Commission* v. *Nelson Bros. Bond and Mtg. Co.,* 289 U.S. 266; *Railroad Commission of California* v. *Pacific Gas and Electric Co.* 302 U.S. 388; *United States ex rel. Vajtauer* v. *Commissioner of Immigration,* 273 U.S. 103.

This then presented the judicial question, raised by respondents' contention that petitioner not having preserved the results of the individual butter fat tests of samples taken each day, from which it computed the daily average utilization of milk and butter fat in its products, during the period July, 1940 to April, 1941, inclusive (R. 359), for which there was no directive or prescribed form, that respondents are authorized like the Collector of Internal Revenue or the Personal Property Tax Collector of the State of Illinois, to levy an assessment on the basis of an estimate, when a tax payer files an inaccurate or misleading return (R. 411-412). The "substantial evidence rule" has obviously no application to this question. This involves the question of respondents' statutory authority and involves a decision of a Federal question in a way probably in conflict with applicable decisions of this Court and involves an important question of Federal law which has not been, but should be, settled by this Court.

The decision of the Circuit Court in its application of the "substantial evidence rule" in this case, is not only a decision of a Federal question in conflict with the decision of this Court but also a decision in conflict with decisions of other circuit courts of appeal. *National Broadcasting Co.* v. *United States,* 319 U.S. 190; *Scripp-Howard Radio, Inc.* v. *Federal Communications Commission,* 316 U.S. 4; *Federal Communications Commission* v. *Pottsville Broadcasting Co.* 309 U.S. 134; *Federal Radio Commission* v. *Nelson Bros. Bond and Mtg. Co.* 289 U.S. 266; *Di Milia* v. *Bowles Price Administrator,* 184 F. (2d) 726; *United States* v. *Anderson,* 108 F. (2d) 476. The decision sought to be reviewed so far departs from the accepted and usual course of judicial proceedings and thereby so far sanctions such departure by district courts as to demand the ex-

ercise of the power of supervision by this Court in granting this petition for a writ of certiorari.

The Circuit Court of Appeals found: "that either the method employed by the plaintiff or that employed by the administrator rested upon the law of averages. It was neither feasible nor possible to test every gallon of milk or even every hundred gallons, but the butter fat content was to be judged by a fair and adequate sampling of the products" (R. 448). The amended Order 41, Sec. 941.4 (d) provides that handlers convert to quarts the quantity of milk processed as fluid milk and multiply by 2.15 (quart weighs 2.15 lbs) and to "multiply the result by the average butter fat tests of such milk" (R. 461), "in the manner and on forms prescribed by the market administrator" (R. 460). The market administrator prescribed no manner or form for determining the average butter fat tests of such milk, as required by this section. This leaves the handler and the Court in the dilemma, as to what is "fair and adequate sampling of the product". This, however, is the "yard stick" that measures petitioner's liability. This section of the amended order, requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application and therefore violates the first essential of due process of law. *Cline* v. *Frink Dairy Co.* 274 U.S. 445.

C.

The Questions Presented.

1. Whether there is substantial evidence in the record to support the respondents' finding that: " 'random sampling' should give as true a monthly average as daily plant sampling," under petitioner's system of operation.

2. Whether the method of sampling employed by the

market administrator gave due consideration to petitioner's system of operation as differentiated from other handlers in the area, who standardized their raw milk before processing or did the method of sampling employed, discriminate against petitioner and require petitioner to pay more for milk than other handlers.

3. Whether the method of sampling employed by the market administrator, taking random samples and tests of petitioner's products and without regard to the volume of milk and butter fat to which each sample related and obtaining an arithmetic average, (upon which result the assessment is predicated) is adapted to petitioner's system of production, or did the method of sampling employed by the administrator discriminate against petitioner and deprive petitioner of property without due process of law.

4. Whether the method of sampling employed by the market administrator, "random sampling" and "spot testing" and obtaining an arithmetic average from the results of the butter fat tests, constitute a verification of petitioner's monthly reports under petitioner's system of production, and did the method employed ascertain the correct figures as required by Order 41, Sec. 941.3 (b).

5. Whether the Circuit Court upon finding "It would seem that the method employed by the plaintiff was in some respects superior to that employed by the administrator—indeed the administrator must have thought so as he later, during the period in question, adopted much the same method", erred in not finding, that there was no substantial evidence in the record to support the administrator's findings and therefore the administrative order was arbitrary and capricious and a denial of due process of law.

6. Whether a report of tests of a perishable commodity (milk products) is susceptible of verification from the mere

record of each test or is it necessary to sample and test the products by an accurate method of sampling to verify the report.

7. Whether the fact that petitioner, who made monthly reports in the detail and on forms prescribed by the market administrator, but did not preserve the record of each butter fat test, from which it determined the daily average milk and butter fat utilization in its products during the period July, 1940 to April, 1941, render its monthly reports incapable of verification or was it the duty of the market administrator to verify the reports as provided in Order 41 Sec. 941.38 (b), to: weigh, sample and test petitioner's products by an accurate method of sampling and in case of errors or omissions to ascertain the correct figures.

8. Whether the respondents have the statutory authority under the Agricultural Marketing Agreement Act, like the Collector of Internal Revenue or Personal Property Tax Collector of the State of Illinois, to levy an assessment based on an estimate, because petitioner did not during the period July, 1940 to April, 1941, inclusive, preserve the records of the individual butter fat tests of samples from which it determined the daily average utilization of milk and butter fat in its products, in the absence of a directive or form requiring that the records be so preserved, or is this penal in nature and does it violate the penal provisions of the Act, 7 USCA 610c.

9. Whether Order 41, Sec. 941.4 (d), providing that handlers convert to quarts the quantity of milk processed as fluid milk and to multiply by 2.15 and "to multiply the result by the average butter fat test of such milk" "in the manner and on forms prescribed by the market administrator," in the absence of the market administrator prescrib-

ing a manner or form for determining the average butter fat tests of such milk; is so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application and therefore violates the first essential of due process of law.

D.

Reasons Relied Upon for Allowance of Writ.

The decision of the Circuit Court of Appeals in holding that its examination, of the judicial questions presented on the record in this case, is limited to the "Substantial Evidence Rule," as pointed out in our part B of this petition, is in conflict with decisions of this Court and other circuit courts of appeal. *National Broadcasting Co.* v. *United States,* 319 U.S. 190; *Scripp-Howard Radio, Inc.* v. *Federal Communications Commission,* 316 U.S. 4; *Federal Radio Commission* v. *Nelson Bros. Bond and Mtg. Co.* 289 U.S. 266; *Di Milia* v. *Bowles Administrator,* 184 F. (2d) 726; *United States* v. *Anderson,* 108 F. (2d) 476.

The decision so far departs from the accepted and usual course of judicial proceedings and thereby so far sanctions such departure by district courts, as to demand the exercise of the power of supervision of this Court in granting this petition for certiorari.

Respondents' contention that because petitioner did not preserve the results of the individual tests of samples taken each day during a portion of the period in question, rendered its monthly reports incapable of verification and, therefore, the administrator was empowered like the Collector of Internal Revenue or the Personal Property Tax Collector of the State of Illinois, to levy an assessment against petitioner, based upon an estimate; presented the judicial question, as pointed out in our part B of this peti-

tion, of the administrator's statutory authority as limited by the penal provisions of the Agricultural Marketing Agreement Act.

The "Substantial Evidence Rule" has obviously no application to this question, which involves an important question of Federal law which the Circuit Court did not but should have decided.

The extent of the statutory powers of the administrator to levy a penalty based upon an estimate, or his lack of power or the limit of its exercise, presents questions of importance to all handlers subject to the Act and is an important question of Federal law which has not been, but should be, settled by this Court.

This Court should clarify the many existing uncertainties and conflicts by granting this petition for a writ of certiorari.

Respectfully submitted,

Ogden Dairy Company, Petitioner,

.....

Counsel for Petitioner.

IN THE

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OCTOBER TERM, 1946.

No.

OGDEN DAIRY COMPANY, a corporation,
Petitioner,

vs.

CLAUDE R. WICKARD, Secretary of Agriculture, United States of America, and MARVIN JONES, War Food Administrator,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Report of Opinion.

The opinion of the Circuit Court of Appeals (R. 445-449) is reported in (157 F. (2d) 445).

II.

Jurisdiction.

1. The date of the order of the War Food Administrator is November 30, 1943 (R. 363). The date of the decree of the District Court is September 19, 1945 (R. 425). The date of the decree of the Circuit Court of Appeals to be reviewed, is October 21, 1946 (R. 450).

2. The jurisdiction of this Court is invoked in accordance with the provisions of Sec. 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 USCA 347) and as more particularly set forth in Part B of the preceding petition.

3. The cases believed to sustain said jurisdiction are as follows: *Scripp-Howard Radio, Inc.* v. *Federal Communications Commission,* 316 U.S. 4; *Federal Communications Commission* v. *Pottsville Broadcasting Co.* 309 U.S. 134; *Rochester Telephone Corporation* v. *United States,* 307 U.S. 125; *Federal Radio Commission* v. *Nelson Brothers Bond and Mtg. Co.* 289 U.S. 266.

III.

Statement of the Case.

A concise statement of the case is made in the preceding petition under Part A.

IV.

Specification of Errors.

The Circuit Court of Appeals erred:

1. Upon finding: "It would seem that the method employed by plaintiff was in some respects superior to that originally employed by the administrator-indeed the administrator must have thought so as he later, during the period in question adopted much the same method."

(a) in not finding that there was no substantial evidence in the record to sustain the finding that "random sampling should give as true a monthly average as daily plant sampling" upon which the order and assessment against the petitioner are predicated, and, therefore, the order and assessment is arbitrary, capricious and a denial of due process of law.

(b) in not finding that the method of sampling employed by the administrator was not adapted to petitioner's system of production, as distinguished from other handlers in the area who standardized their raw milk before processing, and, therefore, discriminates against petitioner, requires petitioner to pay more for milk than other handlers in contravention of the Agricultural Marketing Agreement Act, 7 USCA 608 (5), and deprives petitioner of property without due process of law.

2. In finding that its examination of the questions in this case is limited to a determination of whether there was substantial evidence in the record to support the order of the administrator.

3. In applying the "substantial evidence rule" to the judicial questions raised by petitioner on the record.

4. In not finding, that the administrator not having prescribed a manner or form for determining the average butter fat content in petitioner's products, as required by Order 41, Sec. 941.4 (d), that this section of the order provides for the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, and, therefore, violates the first essential of due process of law.

5. In not finding, that the market administrator is not empowered like the Collector of Internal Revenue or the Personal Property Tax Collector of the State of Illinois to levy an assessment on the basis of an estimate, because petitioner did not preserve the records of the individual tests of samples from which it determined the daily average utilization of milk and butter fat in its products, during the period July, 1940 to April, 1941.

6. In not finding, that the petitioner's reports of utilization of milk and butter fat in its products, during each

month of the period in question, are not susceptible of verification from the record of the individual tests of samples taken during each day and from which petitioner determined the daily average utilization of milk and butter fat in its products, but that it was the duty of the administrator as provided in Order 41, Sec. 941.3 (b) to:

> "(1) Verify the * * * disposition of all milk required to be reported * * *, and in case of errors or omissions, ascertain the correct figures:
>
> "(2) Weigh, sample and test for butter fat content the milk received from producers and any product of milk upon which classification depends * * *" (R. 459).

by an accurate method of sampling and testing adapted to petitioner's system of production.

7. In not finding, that Order 41, Sec. 941 (b) providing that it shall be the duty of the market administrator to: "Verify the * * * disposition of all milk required to be reported * * * and in case of errors or omissions, ascertain the correct figures" (R. 459), does not lend itself to a construction, that the market administrator is empowered like the Collector of Internal Revenue or Personal Property Tax Collector of the State of Illinois to levy an assessment based upon an estimate.

V.

ARGUMENT.

A.

The Circuit Court of Appeals erred in not finding that there is no substantial evidence in the record to sustain the finding of the War Food Administrator that "random sampling will give as true a monthly average as daily plant sampling" and, therefore, the order and assessment predicated thereon, is arbitrary, capricious and a denial of due process of law.

The difference between the results of the random samples and tests taken by the market administrator of petitioner's products and petitioner's monthly reports of utilization of milk and butter fat, during the period in question is the basis of audit and assessment upon which the assessment against petitioner is predicated.

This purported verification was made pursuant to Order 41, Sec. 941.3(b) providing that it shall be the duty of the market administrator to "Verify the * * * disposition of all milk required to be reported * * * and in case of errors or omissions, ascertain the correct figures" (R. 459).

The Circuit Court of Appeals found that on and prior to the effective date of said amended order and during the period in question—July 1940 to March 1942, inclusive—petitioner had four storage tanks of 5000, 4000, 3000 and 1700 gallons capacity, each respectively, where raw milk containing different butter fat content was received in tank trucks daily (R. 447).

The raw milk was not standardized, because of lack of plant facilities, that is to blend the raw milk to a fixed but-

ter fat content before processing (R. 137), a practice of many handlers in the area (R. 181).

The Circuit Court of Appeals further found that petitioner's product, therefore, varied in butterfat content during each day (R. 447).

This involved the question as to whether the method of sampling and testing, employed by the market administrator, ascertained the correct figures under petitioner's system of operation.

The Circuit Court of Appeals found: "It would seem that the method employed by the plaintiff was in some respects superior to that originally employed by the administrator—indeed the administrator must have thought so as he later, during the period in question, adopted much the same method (R. 448). This obviously means that the method of sampling employed by the market administrator of petitioner's products was not adapted to the petitioner's system of production and the results were not the correct figures as required by Order 41, Sec. 941.3 (b) (R. 459) and refutes the finding upon which the order and assessment are predicated.

In *Federal Radio Commission* v. *Nelson Brothers Bond and Mtg. Co.* 289 U. S. 266, 277 Mr. Chief Justice Hughes said:

> "A finding without substantial evidence to support it—an arbitrary or capricious finding—does violence to the law. It is without the sanction of the authority conferred and an inquiry into the facts before the Commission, in order to ascertain whether its findings are thus vitiated, belongs to the judicial province and does not trench upon, or involve the exercise of, administrative authority.
>
> Such an examination is not concerned with the weight of evidence or the wisdom or expediency of the administrative action." Citing cases.

We respectfully submit that it was the duty of the Circuit Court of Appeals upon finding, that there was no substantial evidence in the record to sustain the findings of the administrative body, upon which the order and assessment are predicated, to find that the order and assessment are arbitrary and capricious and a denial of due process of law.

B.

The Circuit Court of Appeals erred in not finding that the method of sampling employed by the administrator was not adapted to petitioner's system of production as distinguished from other handlers in the area who standardized their raw milk before processing, and, therefore, discriminates against petitioner and requires petitioner to pay more for milk than other handlers in contravention of the Agricultural Marketing Agreement Act.

Under petitioner's system of production, as distinguished from other handlers in the area, who standardize their raw milk before processing, in order to ascertain the utilization of butter fat in the volume of milk processed, it is necessary to weigh the result of the butter fat test of the sample to the volume of milk in the storage tank to which each sample related. This was corroborated, on cross-examination, by David F. Russell, a licensed testor, employed by the market administrator (R. 202).

Obviously the method of random sampling employed by the market administrator, obtaining an arithmetic average from the results of the butter fat tests of the samples taken during each month, without regard to the volume of milk to which each sample related (R. 278), is not adapted to petitioner's system of production and did not ascertain the correct figures, as required by Order 41, Sec. 941.3(b) (R. 459).

The Agricultural Marketing Agreement Act, 7 USCA, 608c (5), provides:

"In the case of milk and its products, orders issued

pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7), no others:

"(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers.

"*Such prices shall be uniform as to all handlers,* subject only to adjustments for (1) volume, market and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use calssification thereof, is made to such handlers." (Italics Ours)

The method of sampling employed by the market administrator, not giving due regard to the production differential between petitioner's system of operation and other handlers in the area who standardize their raw milk before processing, therefore, discriminates against petitioner and requires petitioner to pay more for milk than other handlers in violation of the Act, and deprives petitioner of property without due process of law.

We respectfully submit that it was the duty of the Circuit Court of Appeals in view of its findings, "It would seem that the method employed by plaintiff was in some respects superior to that originally employed by the administrator—indeed the administrator must have thought so as he later, during the period in question adopted much the same method" (R. 448), to reverse the decree of the District Court and to declare the administrative order void.

C.

The Circuit Court of Appeals erred in applying the "Substantial Evidence Rule" to the judicial question presented on the record by respondent's contention that the administrator was empowered like the Collector of Internal Revenue or the Personal Property Tax Collector of the State of Illinois to levy an assessment based on an estimate.

The Circuit Court having found in effect that there was no substantial evidence in the record to sustain the findings of the administrator, that random sampling should give as accurate a result as daily plant testing under petitioner's system of operation and that the method employed by the administrator did not ascertain the correct butterfat content in petitioner's products during the period in question and that the method employed by the administrator was not adapted to petitioner's system of production, was under the legal duty to reverse the decree of the District Court, as pointed out in Points "A" and "B" of this brief.

The attempt by the respondents to justify the assessment on the basis of an estimate, presented a judicial question, *i. e.*, are the respondents empowered and authorized by the Agricultural Marketing Agreement Act (as contended by respondents) like the Collector of Internal Revenue or the Personal Property Tax Collector of the State of Illinois to levy a tax based upon an estimate (R. 411-412), because petitioner did not preserve the results of the individual butterfat tests of samples taken each day, from which it computed the daily average utilization of milk and butterfat in its products, during a portion of the period in question—July 1940 to April 1941, inclusive (R. 319).

This despite the fact that there is no directive or form prescribed by the market administrator requiring that the record of the individual tests be preserved and despite the

fact that petitioner filed its monthly reports in the detail and upon forms prescribed by the market administrator during each month of the period in question (R. 34).

This is a judicial question to which "the substantial evidence rule" has obviously no application. *United States* v. *Idaho* 298 U. S. 105; *Crowell* v. *Benson* 285 U. S. 22.

The administrator having found a disparity between the results of his random samples and tests of petitioner's products, without regard to whether the method of sampling employed by him, was adapted to petitioner's system of production, concluded as a necessary corallary, that petitioner manipulated its records and therefore he was justified in using the results of his system of sampling for the purpose of audit and assessment against the petitioner (R. 284).

The Circuit Court found: "The administrator charges that plaintiff has so manipulated its records as to cause them to incorrectly reflect the true butterfat tests made by it" (R. 448): "Our duties have been so circumscribed that we are without authority to appraise the value of the evidence or consider the credibility of witnesses. A study of the record made before the hearing officer leaves us unable to say that there was not substantial evidence to support the conclusion reached by the administrator. Other errors raised on the record are without substantial merit and the decree of the District Court is affirmed" (R. 449).

Von Bauer, Federal Administrative Law, Vol. 2, Sec. 553, p. 544 states:

> "Administrative 'findings' of certain agencies sometimes mix determinations of fact and conclusions of law in such a way as to render analysis difficult, and judicial review a task so annoying for the court that it is easier to uphold the administrative action in general terms than to ascertain whether the essential findings of fact have been made, and if so, whether the correct rule of

law has been applied to them. Preceded by the significant phrase 'We find as follows,' statements taking any position acquire stature. This practice has tended to blur the profound distinction between administrative and judicial questions, and demonstrate the necessity of applying fundamental criteria to 'findings' in order to ascertain whether they determine administrative questions, subject to the doctrines of administrative finality, or merely venture a decision upon a judicial question which is always open for independent decision by an appropriate court acting judicially. (Citing, *Halvering* v. *Tex-Penn Oil Co.* 300 U.S. 481; *Federal Trade Commission* v. *Curtis Publishing Co.* 260 U.S. 568; *Royal Farms Dairy* v. *Wallace,* 8 F. Supp. 975).

"If the doctrine of separation of powers and supremacy of law are to prevail as a practical matter in complex present-day affairs, few things are mort important than the necessity of making this analysis."

We respectfully submit that the Circuit Court of Appeals erred in the case at bar by holding:

"Our examination of the question is limited to a determination of whether there was substantial evidence to support the order of the administrative tribunal." Citing cases (R. 448).

In *Federal Radio Commissioners* v. *Nelson Bros. Bond & Mtg. Co.* 289 U. S. 266, 277, Mr. Chief Justice Hughes, said:

"The powers of the Commission were defined, and definition is limitation. Whether the commission, applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, whether its proceedings satisfy the pertinent demands of due process, whether, in short, there is compliance with the legal requirements which fix the province of the commission and govern its action, are appropriate questions for judicial decision. These are questions of law upon which the Court is to pass."

Respondents' contention raised an important question of Federal Law, which the Circuit Court of Appeals should have but did not decide, and which should be decided by this Court. The question involved the statutory power of the Secretary of Agriculture to impose a penalty without regard to the limitations of the penal provisions of the Agricultural Marketing Agreement Act. 7 USCA 610c, provides:

> "The Secretary of Agriculture is authorized with the approval of the President, to make such regulations with the force and effect of law as may be necessary to carry out the powers vested in him by this chapter. Any violation of any regulation shall be subject to such penalty, not in excess of $100, as may be provided therein."

We submit that, if petitioner was remiss in its duty in failing to preserve the results of the individual tests of samples during the period—July 1940 to April 1941 inclusive—for which there is no directive or prescribed form, that the infraction, if any, of the regulations are subject only to a penalty not to exceed $100.00 for each offense.

Respondents' contention that the Administrator is empowered to impose a penalty measured by the difference in the results of the random samples and tests taken by the market administrator of petitioner's product and petitioner's monthly reports of utilization of milk and butterfat in its products, during the period in question, is penal in nature and not within the statutory power of the Secretary of Agriculture and contrary to the penal provisions of the Act.

D.

The administrator not having prescribed any manner or form for determining the "Average Butterfat Test" as required by Amended Order 41, Section 941.4, was the language employed in that section so vague as to violate the requirements of due process of law.

This controversy arose as a result of the amendment of administrative Order 41, effective July 1st, 1940 (R. 469). Sec. 941.4 (d) (b), requires, for the first time, that handlers account for butterfat in milk processed as fluid milk (R. 303): and provides that handlers determine the quantity of milk so processed, multiply by 2.15 and "to multiply the result by the average butterfat tests of such milk" (R. 461), "in the manner and on forms prescribed by the market administrator" (R. 460).

The market administrator prescribed no manner or form for determining the average butterfat tests as required by this section (R. 361).

The Circuit Court of Appeals found:

> "It is quite obvious that either the method employed by plaintiff or that employed by the administrator, rested upon the law of averages. It was neither feasible nor possible to test every gallon of milk or even every hundred gallons, but the butterfat content was to be judged by a fair and adequate sampling of the product" (R. 448).

This leaves the handler and the Court in the dilemma as to what is "fair and adequate sampling of the product" under petitioner's system of production. Sampling of petitioner's products is the "yardstick" that measures petitioner's liability.

In *Cline* v. *Frink Dairy Co.* 274 U. S. 445, 459, this Court held:

> "A Statute which either forbids or requires the doing of an act in terms so vague that men of common intelli-

> gence must necessarily guess at the meaning and differ as to its application, violates the first essential of due process of law."

The market administrator contends that the language employed in this section as applied to petitioner's system of production, warrants the use of his method of random sampling and testing and obtaining an arithmetic average; the Court finds that the language employed requires a fair and adequate sampling of the product, without specifying as to what constitutes fair and adequate sampling; the petitioner's experts interpret the language employed to mean a method of sampling that considers the volume of milk to which each sample relates, a weighted average, and in this they were corroborated by the testers for the administrator (R. 202).

This demonstrates that the market administrator was remiss in not prescribing a "yardstick" for determining the average butterfat content in petitioner's products under petitioner's system of operation. This would resolve the question as to the method to be employed, satisfy the requirements of the order and establish with certainty handlers' obligations.

We respectfully submit that the Circuit Court of Appeals erred in not finding that the language of the order is so vague as to violate the essentials of due process of law and therefore the assessment and order predicated thereon are void.

CONCLUSION

It is therefore submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

Respectfully submitted,

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Counsel for Petitioner.